SUPREME COURT, U. S.

No. 857

FILED

JAN 15 1968

CLERK

# In the Supreme Court of the United States

## OCTOBER TERM, 1967

---

JAMES MILLER, a/k/a FRANK JAMES COPPOLA,
PETITIONER,

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General*,

FRED E. VINSON, JR.,
*Assistant Attorney General*,

[illegible],
*Attorneys*,

*Department of Justice*,
*Washington, D. C. 20530*.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 21 |
| Appendix | 22 |


## CITATIONS

Cases:


| | |
|---|---|
| *Byrnes* v. *United States*, 327 F.2d 825, certiorari denied, 377 U.S. 970 | 15 |
| *Remmer* v. *United States*, 350 U.S. 377 | 12 |
| *Rivard* v. *United States*, 375 F.2d 882 | 3 |
| *United States* v. *Aiken*, 373 F.2d 294, certiorari denied, October 9, 1967 (No. 94, this Term) | 19 |
| *United States* v. *Armone*, 363 F.2d 385, certiorari denied, 385 U.S. 957 | 19 |
| *United States* v. *Borelli*, 336 F.2d 376, certiorari denied, *sub nom. Mogavero* v. *United States*, 379 U.S. 960 | 12 |
| *United States* v. *Gainey*, 380 U.S. 63 | 19 |
| *United States* v. *Grayson*, 166 F.2d 863 | 9, 10 |
| *United States* v. *Melekh*, 193 F. Supp. 586 | 9 |
| *United States* v. *Monroe*, 164 F.2d 471, certiorari denied, 333 U.S. 828 | 9 |
| *United States* v. *Solowitz*, 99 F.2d 714 | 9 |
| *Yee Hem* v. *United States*, 268 U.S. 178 | 19 |


Statutes:


| | |
|---|---|
| 18 U.S.C. 3500 | 17 |
| 21 U.S.C. 174 | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA,
PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals is reported at 381 F.2d 529.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on July 26, 1967. A petition for rehearing was denied on September 26, 1967. Mr. Justice Harlan extended the time for filing a petition for a

writ of certiorari to November 25, 1967, and on November 24 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the identification of petitioner by an alias in the indictment was proper.
2. Whether the action taken by the trial judge after learning that three jurors were aware of an improper communication to one of them was correct.
3. Whether there were prejudicial irregularities in the pretrial conduct of the government agents or counsel, or resulting from the secretion of the children of the principal witness at trial.
4. Whether the trial court's instruction on the statutory presumption arising from the possession of narcotics was correct.
5. Whether the evidence was sufficient to establish petitioner's identity as the person who received shipments of narcotics on two occasions.

## STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy to import narcotics into the United States, in violation of 21 U.S.C. 174. On September 26, 1966, he was sentenced to imprisonment for twelve years. The court of appeals affirmed.[1]

---

[1] While this petition was pending, the district court, on November 20, 1967, denied petitioners' motion for a new trial. In view of petitioner's reference to an alleged confession to

The indictment, returned in the Southern District of Texas on May 27, 1964, charged petitioner and six others with conspiring from January 1, 1963 to the date of its return to smuggle narcotics from Canada and Mexico into the United States.[2] Petitioner, who resided in Connecticut, was alleged to have received two shipments of narcotics from Canada, in furtherance of the conspiracy.

The evidence showed that prior to June, 1963, Lucien Rivard, Charles Groileau, Jerry Massey, and Joseph R. Jones (co-defendants convicted in the Southern District of Texas) were in the business of importing substantial quantities of narcotics from Europe and smuggling them into the United States from their home base in Montreal (Tr. 155).[3] In June, 1963, Massey introduced Joseph Caron—the principal prosecution witness—into the operation. With Massey's assistance, Caron obtained a 1962 Chevrolet, suitable for carrying loads of heroin.

---

this charge by another man (Pet. 8), we have set forth as an appendix to this brief a copy of the district court's opinion on petitioner's motion for a new trial which details the suspicious circumstances surrounding the obtaining of this confession.

[2] Four of petitioner's co-defendants, all Canadians, were convicted in the Southern District of Texas and sentenced to terms of imprisonment varying from ten to twenty years. Their convictions were affirmed by the Fifth Circuit on April 18, 1967. *Rivard* v. *United States*, 375 F.2d 882. The remaining two co-defendants have not yet been arrested. The court transferred petitioner's case to Connecticut.

[3] The twenty-volume transcript of trial ("Tr.") has been filed with the Clerk of this Court.

Thereafter, Massey and Jones travelled to Europe on different ships to obtain supplies, each taking an automobile with him. Subsequently, Caron received a call from Groileau, informing him that "Massey was on his way back with a load," and instructing him to proceed to the pier to check for police (Tr. 203). Caron met Massey at the pier, where Massey's car was unloaded from the ship. Massey later told Caron that his car contained sixty-eight pounds of "white powder." (Tr. 212).

In August, 1963, Massey told Caron that he would be taking the load into the United States (Tr. 216-217). At first, Caron was told that his destination would be Flint, Michigan, and Caron received explicit directions as to the place in that city where he would meet his American contact (Tr. 217-218). Later, Rivard (the apparent head of the organization) changed the itinerary, and told Caron to travel to Bridgeport, Connecticut (Tr. 218). Massey loaded Caron's car with narcotics, and told him that his destination was the Bridgeport Motor Inn, where he was to register under the name Mr. Robert (Tr. 221).

Caron, accompanied by his wife, arrived at the Bridgeport Motor Inn at approximately 5:30 a.m. on Tuesday, August 20, 1963 (Tr. 223, 1856-1859). On arrival, Caron registered as Mr. Robert, and, pursuant to instructions, left his car in the motel parking lot with one door unlocked, his keys and registration card in the ashtray, and a paper upon which his room number was noted on the windshield (Tr. 225-227). Shortly thereafter, petitioner came to his room bear-

ing the keys and registration card, and informed Caron that he could not take the car that day. The next day, petitioner telephoned, saying once again that he could not take the car (Tr. 230). The following morning, August 22, petitioner phoned again and told petitioner that he would pick up the car that day.[4] Caron then locked all but one door of the Chevrolet and left the keys and registration in the ashtray as before (Tr. 233). When Caron went to lunch, he noticed that the car was gone. At approximately 4 p.m. petitioner returned the keys and registration to Caron in his motel room and gave Caron $50 to defray the cost of staying longer at the hotel than planned (Tr. 241).

When Caron returned to Montreal he communicated with Rivard, who asked him "How is Frankie my friend?" (Tr. 256). Caron, who had not previously known the name of his Bridgeport contact, informed Rivard that he was well. When Caron remarked that "Frank" had "beautiful hair," Rivard replied that Frank was a hairdresser (Tr. 255).[5]

In September 1963, after Jones returned from Europe with another supply of heroin, Caron was again sent to Bridgeport. Rivard, who had been disturbed

---

[4] Petitioner told Caron that he had been up late the night before. A defense witness, petitioner's uncle by marriage, stated on cross-examination that he had been with petitioner at the latter's home on Wednesday night, August 21, until 2 a.m. the following morning (Tr. 2683-2684).

[5] The evidence adduced by both parties established that petitioner was the owner of one prosperous beauty shop in Milford, Connecticut, and had an interest in others.

by the three-day delay in effecting Caron's first delivery, told Caron that he would contact Frank and tell him to "make it fast. They won't hold you there no more three days." (Tr. 259). The directions given to Caron were similar to those for the first trip. This time three of his children—the eldest about nine years old—as well as his wife accompanied him (Tr. 259). Caron crossed the border on September 20, made his call to Rivard, and, after spending the night in Albany, arrived at the Bridgeport Motor Inn in the early afternoon of September 21 (Tr. 1862). After his wife checked in under an assumed name, Caron took his family to an adjoining restaurant. While sitting in a booth by a window, Mrs. Caron observed two men, one of whom was petitioner, standing by their Chevrolet in the motel parking lot. She called this to Caron's attention (Tr. 262, 1594-1595). Caron went to the car, where he met petitioner and another man, and gave petitioner the car keys and registration card. Petitioner told Caron to meet him in the restaurant after his family had eaten. Caron rejoined his family, but shortly thereafter petitioner came over to their booth and told Caron, "Come on, let's go." (Tr. 264). Caron and petitioner sat in another part of the restaurant, where petitioner told him that twice was enough and that he should not return to Bridgeport because it was too risky: "Next time tell Rivard to send you to Flint, Michigan." (Tr. 264). Petitioner and Caron proceeded in the latter's car to a nearby traffic light, with the other man following in another car. At the light, Caron was told to walk

back to the motel, while petitioner drove away (Tr. 266). Later that day, the car was returned.

Caron was arrested on October 10, 1963, after his car was searched by customs agents in Laredo, Texas, and a cache of heroin discovered (Tr. 4-27, 48-49). On February 26, 1964, Caron, who had pleaded guilty to violating the narcotics laws, was sentenced to imprisonment for ten years (Tr. 501).

## ARGUMENT

1. The indictment identified petitioner as "Frank James Coppola alias James Miller." Prior to trial, the government informed the court that petitioner's true name was James Miller and that Coppola was the alias. At the commencement of trial the court read to the jury array the style of the case, listing the seven alleged conspirators, including "Frank James Coppola alias James Miller." He then stated "The only defendant who will be tried here today in this case is the defendant James Miller. The Court has been informed that the defendant's name is James Miller alias Frank James Coppola" (Pet. 14a; 381 F.2d at 536). Throughout the month-long trial, petitioner was referred to solely as James Miller, and the name Frank Coppola appeared only when relevant evidence was introduced to support the government's contention that petitioner was the "Frank" whom Caron had met in Bridgeport (See Pet. 8).

At the trial, the principal claim of the defense was that Caron's identification was unworthy of belief, and that petitioner was not known by the name

Frank. In support of this claim, defense counsel attempted to show that several other individuals, some named Frank—including one who had been a hairdresser in Connecticut with a prior narcotics conviction [6]—might have been the guilty party. In rebuttal, the prosecution introduced an arrest record dated 1949 bearing petitioner's picture and fingerprints and the signature "Frank Coppola." With a proper limiting instruction to the jury as to the purpose for which it could consider the record, the court admitted it in evidence (Tr. 3359; Govt. Exh. CF).[7]

In his closing charge the trial judge referred to the name Frank James Coppola only when reading the indictment. For the remainder of his lengthy charge he called petitioner James Miller, and advised the jury, "Now, as you know, this case involves criminal charges brought by the Federal Government against the defendant, James Miller. We referred to him here as James Miller." (Tr. 3612). The trial judge also told the jury that the indictment was not evidence "even in the slightest degree." (Tr. 3611).

Contrary to petitioner's contentions, he was not tried under a "phony alias" (Pet. 12). The alias was an essential part of the government's case, since its principal witness never knew petitioner as James Miller, but learned from his co-conspirators that his

---

[6] The government proved that the hairdresser named Frank had been in prison at the time of the first shipment of narcotics to Bridgeport (Tr. 3286).

[7] Defense counsel admits knowledge of the existence of the arrest record prior to trial. Pet. 13.

name was Frank and his occupation was that of a hairdresser. Moreover, petitioner founded his defense upon a claim of mistaken identity, asserting that he was not Frank and since early childhood had been known only as James Miller (Tr. 3086-3102, 3127-3151. Def.Exhs. 36-50).[8] This, then, was not a case of "loading indictments with unnecessary aliases", as deplored in *United States* v. *Monroe*, 164 F.2d 471 (C.A. 2), certiorari denied, 333 U.S. 828, relied upon by petitioner in the court below. As stated in *United States* v. *Solowitz*, 99 F.2d 714, 715 (C.A. 7):

> Of course, if a person has used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the Government proves such aliases, there can be no legitimate complaint. * * *

See also *United States* v. *Melekh*, 193 F. Supp. 586 (N.D. Ill.).[9]

---

[8] Petitioner argues that the arrest card bearing his fingerprints and the name and signature "Frank Coppola" was introduced in the government's rebuttal as an unconscionable tactic to prevent his taking the stand and explaining it away. This argument is little more than an afterthought. When the arrest record was introduced, defense counsel made several objections, based upon remoteness, hearsay, lack of authentication, and the inflammatory nature of the exhibit. No claim was made that petitioner was precluded from attacking the exhibit by taking the witness stand. Petitioner made no request to the trial judge to allow him to testify at that juncture out of the presence of the jury (Tr. 3346-3354).

[9] *United States* v. *Grayson*, 166 F.2d 863 (C.A. 2), upon which petitioner bases his argument, is not to the contrary. There, Judge Learned Hand reviewed an assertion of prejudice arising from an unnecessary reference to an alias in the

2. During the trial, the court admonished the jurors not to listen to radio and television reports or to read newspaper accounts of the trial. He also told them to report incidents involving information about the trial received from outside sources. In the fourth week of trial, when petitioner's defense was being presented, the court, out of the presence of the jury, informed counsel that he had received information that some jurors had heard rumors that they would be in danger if a verdict favorable to petitioner were not reached. The principal defense counsel, Mr. Foreman, suggested that the court conduct a hearing in chambers to determine the effect of the threat upon the partiality of the jurors involved. The court indicated to counsel that he would like to discuss the matter with the jurors immediately. Defense counsel, however, requested that the discussion be delayed and that he be allowed to finish his case (Tr. 3700). Defense counsel suggested that no counsel be present when the court conducted its inquiry (Tr. 3705).[10]

After all evidence had been presented, the court met with the three jurors involved, and learned that, at a dinner party attended by one of them, a friend had

---

indictment. Since the defendant's identity had not been in issue, Judge Hand found no justification for the inclusion of the alias. Nevertheless, he discussed this and two other claims asserted by the appellant in a group of "least important" claims and concluded that, even though two of the three were meritorious, they "would not in our judgment even remotely tend to justify a reversal." 166 F.2d at 867.

[10] Counsel had agreed to waive petitioner's presence at the conference, and had received petitioner's express waiver of his presence (Tr. 2790-2792).

told him that another man residing in the same general area had informed him that a certain "bunch" in Torrington would "get after you" and "beat you up" after the trial (Tr. 3718). This juror had mentioned the incident to the other two jurors. The court carefully discussed the subtleties of the situation: that it might cause a subconscious reaction of hostility toward petitioner. The following ensued (Tr. 3720):

> THE COURT: * * * But the question is whether or not, in the face of that remark and those circumstances of which you are aware you feel in your own mind that it will have no effect whatsoever upon your decision in reaching a verdict in the case:
>
> JUROR PARSONS: No.
> JUROR BALDWIN: No.
> JUROR LESTER: Not a particle.

One of the three then informed the court that there were two places in Torrington where his grandsons had reported dope being sold, apparently suggesting to the trial judge that he advise the proper authorities about it. The juror added that "it doesn't affect me any, only to the extent I have grandsons, and so forth." Upon further questioning from the court about the effect of such extrinsic information on this case, he stated "it has nothing to do with me. I will say it the way I see it." (Tr. 3718-3723). The conference ended after the trial judge was assured that no other jurors were aware of the incident. The judge then met with counsel and advised them of his conference with the jurors, observed that he was satisfied that they were not intimidated in any way, and

that no prejudice would result to either side from the rumor (Tr. 3371).

The record shows that the purpose of the court's inquiry was to protect the rights of petitioner, and not, as petitioner contends, to avoid granting a mistrial and thereby rendering useless four weeks of work. See *United States* v. *Borelli*, 336 F.2d 376, 392 (C.A. 2), certiorari denied *sub nom. Mogavero* v. *United States*, 379 U.S. 960. Unlike *Remmer* v. *United States*, 350 U.S. 377, the court conducted a full and fair investigation of the incident with the three jurors who were aware of it. There is no foundation for a belief that any of the jurors were placed "under a terrific pressure" (see *Remmer*, *supra*, at 381), because of the communication of the cocktail party gossip. While, as the court of appeals noted, it might have been better to have interviewed each of the jurors individually, the failure to do so was not, in the circumstances, a misuse of the broad discretion of the trial judge in this area.

3. The assertion that the government wilfully destroyed or withheld evidence or resorted to improper tactics has no basis in the record.

(a) The claim regarding unfair publicity in Connecticut is carefully reviewed in the court of appeals' opinion which notes that, whether or not certain agents of the government provided information to the press when petitioner was arrested, trial did not occur until two years later. The trial court, in its thorough voir dire and instructions during the trial, adequately ensured that the selected jurors had no preconceived prejudices.

(b) The car in which Caron was apprehended in Laredo was the one which petitioner had had in his possession for a short time during Caron's last trip to Bridgeport some three weeks before. The car was forfeited and used by the government in normal course. In September, 1964, several months after petitioner was indicted, defense counsel, in a letter to the United States Attorney, indicated an interest in inspecting the car. The record is silent as to any further steps taken by petitioner until July 15, 1965, when a motion was made for an inspection and promptly granted. No attempt was ever made by the defense to avail themselves of the opportunity to inspect the car. When petitioner's case was transferred to Connecticut, counsel moved to dismiss the case because, they alleged, the use of the car by the government effectively destroyed its evidentiary value. This motion was denied. At trial, the car was not introduced in evidence, and the prosecution did not rely on any scientific examination to establish that heroin had been transferred in it. When defense counsel asserted that scientific evidence could have established the absence of heroin in the car if such an examination had been made, the court responded that it would allow counsel to offer proof to that effect. Counsel made no attempt to do so.

The claim is now made (Pet. 20-21) that, if the car had been preserved as it was when first seized, it might have yielded evidence as to the identity of the "Frank" who had driven it three weeks before the seizure, and that the government deprived petitioner of evidence by not itself undertaking a scientific in-

vestigation for that purpose. However, if petitioner thought the car might yield evidence useful to him, he should have moved more promptly for an inspection.

(c) Prior to and during the trial, the whereabouts of witness Caron's wife and children had been kept secret by the government because of threats received by Caron that they would be harmed if he cooperated with the government. The government produced Mrs. Caron at trial and she testified concerning the two trips she made with her husband to Bridgeport. When defense counsel requested the production of the two eldest children who had accompanied their parents on the second trip to Bridgeport (the older was nine years old at the time), the government expressed a reluctance to reveal their whereabouts (Tr. 405-407; 423-427). Later in the trial, government counsel informed the court that he had been advised of no medical reason why the children could not be brought to the trial, and agreed to bring them to the jurisdiction to accept a subpoena, if defense counsel so desired (Tr. 1264-1270). At that point, defense counsel, Mr. Foreman, requested a two step procedure: first a court ruling giving him an opportunity to interview the children, and secondly, their production as witnesses if defense counsel so desired. Government counsel then stated that every witness had the right to refuse to be interviewed, and that, since the children were minors, their lawful guardian, Mrs. Caron, would have to decide whether she wished the children to be interviewed by Mr. Foreman in advance of any court appearance (Tr. 1267). The court announced

that it would consider Mrs. Caron the lawful guardian of her children and agreed that she had authority to decide whether they would be subjected to an interview (Tr. 1271-1274). The following day of court, government counsel reported that, at a meeting attened by himself, Mr. Foreman, and Mrs. Caron, she had expressed unwillingness to have the children interviewed (Tr. 1478). However, government counsel further advised the court that the children would be brought to the jurisdiction for the purpose of being available to accept a subpoena if Mr. Foreman so desired. No further steps were taken by the defense during the remainder of the trial and the children were not called as witnesses.

The court's ruling that Mrs. Caron had the right to refuse to subject her children to an interview with defense counsel was clearly correct. It is hardly a novel rule of law that witnesses have the right to refuse to be interviewed if they so desire and are not under legal process. *Byrnes* v. *United States*, 327 F.2d 825 (C.A. 9), certiorari denied, 377 U.S. 970. Since the witnesses here were young children, it was proper for the court to rule that the decision to subject them to an interview would be made by their parent. At the same time, to protect the defendant's right to summon witnesses in his own defense, the trial judge agreed that the children must be made available for subpoena.

In addition, we point out that the assistance that these children might have given the defense's case was negligible at best. The children saw "Frank" only momentarily when he approached the booth where

they were eating lunch and requested Mr. Caron to come along with him. It is inconceivable that at trial two and one-half years later they would have been able to recollect such a brief encounter with a stranger whom they had no special reason to remember. The jury would hardly have been impressed if they could not have identified petitioner.

(d) From the inception of the trial, petitioner attempted to convince the jury that Joseph Caron was totally unworthy of belief.[11] To further this attempt, defense counsel subjected Caron to seven days of cross examination, during which time he posed numerous questions suggesting that Caron had bargained with the government for his freedom in exchange for his testimony. Each attack was met with denials that any deal had been made whereby Caron would be freed if he gave testimony to convict petitioner (Tr. 445-448, 496-497, 540, 555, 830). Caron admitted that shortly before giving evidence at the trial in Texas (September 1965) he had informed a government attorney of his intent to seek a pardon, that the attorney and other government agents promised to support him, and that his application was currently pending before the Board of Pardons. Caron further stated that he had talked to the assistant prosecutor, Mr. Butler, about the matter, and received a reply, that, if he told the truth, Butler would also support the request for clemency (Tr. 1546).

---

[11] As early as his opening remarks, Mr. Foreman charged that the government "purchased" Caron's testimony.

Among the many motions made by defense counsel were requests pursuant to 18 U.S.C. 3500 for certain materials relating to the possibility of a pardon (Tr. 513). The court, noting that it had called upon the government to produce many other materials that were "peripheral", "out of an abundance of assistance to counsel for the defense", told government counsel that it would not require production of the applications for clemency (Tr. 1243-1245). In light of the admission by Caron that he had sought a pardon prior to testifying and that federal officials had stated that they would support his application, there was no error in the trial court's refusal to order production of the pardon application.

4. In his charge to the jury, the trial judge set forth all of the elements of the offense. As to one of these elements—knowledge that the drugs had been imported into the United States contrary to law—the court indicated that the government could establish knowledge in two ways: the "normal way" (Tr. 3619), *i.e.*, the testimony that Caron, a French-speaking Canadian, had identified himself to petitioner as a courier from Canada, and had brought with him from Canada a car bearing Canadian registration and license plates; or, said the court, the government could rely on the statutory presumption of knowledge arising from proof of possession, which "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury." (Tr. 3620). The court further instructed (Tr. 3620-3621):

Now, that statute that I have just read does not change the fundamental rule that a defendant is presumed innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon a defendant the burden of producing proof that the narcotic drug was lawfully imported, or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt beyond all reasonable doubt.

What that statute means is that upon a trial for a violation of this statute if the jury should find from the evidence beyond a reasonable doubt that a defendant has had possession of the narcotic drug as charged, the fact of possession alone, unless explained to the satisfaction of the jury, permits you to draw the inference and find that the narcotic drug was imported contrary to law, and to draw the further inference that the defendant had knowledge that the narcotic drug was imported contrary to law.

Now, in connection with any explanation a defendant may choose to offer for having possession of a narcotic drug, you are reminded that in the exercise of constitutional rights the defendant need not testify. Possession may be explained through other circumstances and other evidence, independent of testimony of the accused.

Later, the court emphasized that petitioner was not required to testify, that his failure to take the witness stand created no presumption against him "and I instruct the jury that you must not permit this fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner." (Tr. 3683).

The sole function served by the instruction on the statutory presumption was to allow the jury to infer that petitioner had knowledge of the illegal importation.[12] This instruction did not eliminate the prosecution's burden of proving all of the elements of the offense charged, and the quoted portions clearly establish that petitioner's right to silence was not destroyed. To the contrary, the instructions were "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand." *United States* v. *Gainey*, 380 U.S. 63, 71. See also *United States* v. *Armone*, 363 F.2d 385 (C.A. 2), certiorari denied, 385 U.S. 957; *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, October 9, 1967 (No. 94, this Term).

5. Petitioner's insistence that he was unfairly convicted prompts a review of the testimony given by Caron identifying him as the recipient of two shipments of heroin. The record does not bear out petitioner's allegation that he was the victim of mistaken identification. The testimony of Caron was clear and unequivocal. He admitted his role in the conspiracy while recounting his three sojourns in its furtherance. He was unshaken in his identification of petitioner as the "Frank" to whom he twice delivered large amounts of heroin. Caron never identified any other

---

[12] The validity of the presumption with regard to the connection between possession and knowledge of illegal importation was recognized by this Court as early as *Yee Hem* v. *United States*, 268 U.S. 178.

man as Frank. On one occasion after his imprisonment, when shown several pictures by government agents, Caron selected one of Anthony Mancuso [13] as resembling petitioner, but pointed out the significant differences in features between Frank and the photograph of Mancuso (Tr. 2074-2079, 2312-2316). In February 1964 Caron was taken from the prison to Bridgeport to observe locations which government agents knew petitioner to frequent. Although totally unfamiliar with the locations and unaware where and at what time he would see petitioner, Caron tentatively identified petitioner the first time he saw him, but requested another opportunity to obtain a closer look before making a positive identification.[14] The following day he received that opportunity and, without anyone calling his attention to petitioner, Caron pointed him out and made a positive identification (Tr. 757-772, 2119-2122, 2144-2148).

Attempts by defense counsel to show that the person who received the narcotics from Caron in Bridgeport was Frank Lucien (Tr. 690, 697, 813), Mancuso (Tr. 733), Frank Piccolo (Tr. 2195-2197, 2305-

---

[13] Caron never identified a picture of anyone named Frank Mancuso, as petiitoner charges (Pet. 25).

[14] Caron's observations were made from a truck, in which he and several federal and state officers were passengers. The truck drove to a number of locations before parking in a shopping center lot, where Caron made his first tentative identification of petitioner. The next morning the truck drove to a parking lot in the rear of petitioner's salon. Caron positively identified petitioner after the latter arrived in his car and parked adjacent to the truck (Tr. 495, 756-772, 2118-2124, 2138-2148, 2259-2290).

2306), or Frank Musial (Tr. 3268-3271) were entirely unsuccessful, as were counsel's attempts to show that petitioner was working in his salon at the time the shipments of narcotics were supposed to have been transferred to him.

The complaint of unfairness on the part of the prosecution is without foundation. To the contrary, the prosecution's fairness was acknowledged at trial by defense counsel, who at one point told the court: "I never had a more courteous prosecution, your Honor. I am not complaining about any treatment whatever." (Tr. 929-930).[15]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
MERVYN HAMBURG,
*Attorneys.*

JANUARY 1968

---

[15] The petition for certiorari contains other unsubstantiated charges which are mere conjecture by petitioner's attorneys. As to one of these allegations—wiretapping (Pet. 25)—as early as July 23, 1964, in an affidavit opposing a motion to suppress, the government responded, "This charge is completely unfounded in fact and untrue." (Tr. 2180, 3797-3805).

## APPENDIX A

## UNITED STATES DISTRICT COURT
## DISTRICT OF CONNECTICUT

Criminal No. 11,191

UNITED STATES OF AMERICA

*-vs-*

JAMES MILLER

### RULING ON MOTION FOR NEW TRIAL

The defendant moves for a new trial on the ground that newly discovered evidence reveals that the government witness Michael Caron made a mistaken identification. At the trial, only obliquely did the defense question the fact that two separate loads of narcotics had been delivered to a man in Bridgeport. The dominant issue was whether that man was the defendant James Miller. His defenses were an alibi and mistaken identification. After hearing extensive evidence, the jury resolved both factual issues against him and found him guilty of conspiracy to smuggle heroin into the United States in violation of 21 U.S.C. § 174. The case was vigorously defended at trial and exhaustively prospected for error on appeal. The conviction was affirmed. *United States* v. *Miller*, 381 F.2d 529 (2d Cir. 1967).

The defendant now comes forward with evidence that one Mario Natalizio has confessed to being the man to whom the deliveries of heroin were made. As indicated, the identification of that man as Miller at the trial did not go unchallenged. A substantial portion of the trial which extended through every trial day of May 1966 was devoted to undermining the

identification of Miller by Caron, the carrier who delivered the heroin at Bridgeport, and by his wife, who accompanied him to Bridgeport on both trips. The defense in a cross-examination of Caron which lasted seven days resorted to all of the generally used methods for attacking Caron's credibility in great detail. He was questioned about his prior criminal conduct;[1] his making of knowingly false statements; the existence of bias on account of promises by the government to assist him in obtaining a pardon (he had been sentenced to ten years imprisonment in Texas), because of money paid by the government toward the support of his wife and young children in this country, and the government's grant to him of admission to the United States as a permanent resident; and more. The circumstances under which he made his pre-trial identification of Miller were thoroughly probed. See *United States* v. *Miller*, 381 F.2d at 537-38. It was also suggested that a Connecticut state policeman had contrived to have Miller identified to satisfy a personal grudge against him.

From another aspect at trial, the defense suggested that Caron was mistaken; that the "Frank" to whom he said he made the deliveries was some other Frank. They suggested it was Frank LeChien (Tr. 690-95) or Frank Musial (Tr. 3242-56). It introduced a mug shot and police record of the latter into evidence, but on rebuttal the prosecution proved that Musial was safely in jail when the deliveries were made. This brief exposition of the extent to which the identification issue was litigated at the trial will serve as a background against which the defendant's motion for a new trial should be considered.

---

[1] Inquiry about criminal conduct which had not been established by conviction was permitted.

The rule is that when a motion for a new trial is based on newly discovered evidence, the moving party must satisfy the court that the evidence is newly discovered, that it was unknown to the defendant at the trial and that such absence of knowledge was not due to any lack of diligence on the part of the defendant. Being "new" as so tested is not enough. The evidence must also be material, not merely cumulative or impeaching—such that it will probably produce and acquittal. *Berry* v. *State*, 10 Ga. 511, 527 (1851); *cf. United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir. 1958). Motions for new trials are not favored and should be granted only with great caution. *United States* v. *Johnson*, 327 U.S. 106 (1946).

These several aspects from which the evidence should be considered must be examined more fully.

The principal item of evidence offered is a written confession in the handwriting of Mario Natalizio.[2] In fact, there are two different version of a confession, each on two sheets of paper, and each sheet dated July 12th. Three pages were signed by Natalizio. These were mailed from Miami, Florida, on July 14, 1967, in a plain envelope addressed: "Webb Manuturing [sic], Box 510, Milford, Conn." [3] They were received at that address by Mr. Richard H. Simons, who is the president of Webb Mfg. Co. He is also the defendant's attorney and has been acting as such throughout this entire criminal proceeding.

*Is the confession newly discovered?*

Before considering the content of the confession with respect to its materiality or its likely effect in

---

[2] Items offered to corroborate the confession are referred to later.

[3] It is obvious that the handwriting on the envelope is written by a hand different from that of Natalizio.

the event of a new trial, the question is whether it is newly discovered, i.e., since the trial.

Obviously, the written statement signed by Natalizio in July 1967 stating that he was the man who received the narcotics in Bridgeport on August 22nd and September 21st in 1963 from Caron is new in its present form. But the substance of it, that Natalizio and not Miller was the Bridgeport member of the conspiracy to whom the deliveries were made, is *not* new. So far as that may be accurate information, both Miller and his attorneys knew about it in 1965, long before the trial.

The affidavit of Mr. Simons states that on January 8, 1965, he again informed the Chief Assistant United States Attorney for the Southern District of Texas "of the facts pointing to Natalizio's guilt and Miller's innocence. . . ." More to the point, his affidavit continues: "On August 6, 1965, I caused James Miller, under the direct supervision of three private investigators, to confront Natalizio with knowledge of his participation in the transactions at the Bridgeport Motor Inn in August and September, 1963, and to demand that Natalizio provide the defense with the times on which the meetings with Caron occurred . . . . Miller also asked Natalizio for money for the defense. . . ."

At the hearing on the present motion, the defendant offered a purported transcription of a taped recording of this Miller-Natalizio confrontation.[4] Reading it

[4] The transcription and tape were marked for identification at the hearing on October 9, 1967. Upon the filing of another affidavit by Mr. Simons on October 16, 1967, attesting to their authenticity the identification limitation was stricken. I have read the transcription, but have not listened to the tape. I do not pass on whether the tape and the transcription are authentic, but it should be pointed out that

without reference to the stage business interjected into the script, Miller, wearing a concealed transmitter strapped to his thigh, introduced himself: "My name is Jimmie Miller, you hear—Jimmie Miller. . . . I'm Jimmie Miller the guy who got pinched in place of you in Bridgeport. Do you know now?" Natalizio to Miller: "You're innocent of the whole rap." Then Miller, aware of the fact that Caron had already identified him and had told the authorities the time and surrounding circumstances of the deliveries of narcotics at Bridgeport, informed Natalizio of this. Miller asked him: "Now think. What time? Just give me the time.[5] That's all I need. And money. Now if you're in trouble, or whatever you're saying, I'm in worse trouble." Natalizio said: "I'm glad you come. Between you and I, I don't sleep. I got you on my mind more than you got yourself on your mind. Whether you realize it or not. Whether you realize it or not, I've got you on my mind until this thing is straightened out. I can't do nothing until I see this thing through."

Thus, as of August 6, 1965, Miller and his attorney admittedly knew and urged the prosecuting authorities to believe that there was evidence that Natalizio should have been cast in the role filled by Miller at the trial. Realizing that this is not newly discovered evidence, the defense argues that a confession made to the defendant is quite a different thing from a written confession. While a written statement may

---

Natalizio has recently denied under oath that he made those statements on the transcription which might be construed as self-incriminating.

[5] Miller was emphasizing that he was faced with the need for this information for the purpose of limiting the number of witnesses he would need to substantiate his alibi defense.

be different in form from an oral one evidencing the same facts, its probative force is not necessarily greater. If anything, the tape record of the conversation between them *prior* to Miller's conviction, monitored as claimed by a reliable investigative agency, would have carried greater weight at the trial than the written confession given after Miller's conviction when there is little likelihood that Natalizio could be convicted.

As further support for his argument that *newness* should be tested by the probative value of the later found evidence, rather than by its subject matter, the defendant's motion alleges several other items to corroborate Natalizio's confession. While the corroborative merit of these items are open to serious question, these too are not newly discovered. One item is a written statement signed by Natalizio taken by government investigators on March 26, 1965, in which Natalizio denies that he was in Bridgeport between May 1962 and Christmas 1963. The defendant alleges that this "statement is demonstrably false." Quite apart from the fact that the attack upon the truth of Natalizio's statement rests primarily on hearsay statements made by Louis and Charles Schnee, the disbelief of the statement would provide no basis for concluding that the opposite is true. See *Dyer* v. *MacDougall*, 201 F.2d 265 (2d Cir. 1952). As Chief Judge Aldrich observed in *Janigan* v. *Taylor*, 344 F. 2d 781, 784-85 (1st Cir. 1965), "[w]ere the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed." Still, the criticism having been made, by using the same standards the defendant himself sets, Natalizio's written confession would not be worth of belief. But even if that self-contradiction

could be regarded as confirmation, *cf. United States v. Nuccio*, 373 F.2d 163 (2d Cir.), *cert. denied*, —— U.S. —— (1967), it too was not newly discovered.

The motion further alleges that in August of 1967 Natalizio twice orally confirmed the written confessions to two private investigators in the employ of the defense attorney. This bolstering of the confession does not make it any newer. Whatever bearing it may have on whether the "confessions" are true will be discussed later.

The defendant alleges that Natalizio undertook through Charles Schnee to have some registration cards removed from both the Bridgeport and Fairfield Motor Inns in October or November 1963 for dates in August and September. To the extent that there may have been maneuvering at Natalizio's instigation to get some cards from the Bridgeport Motel, Mr. Simons' affidavit[*] discloses that he knew this from Charles Schnee (whose hearsay statements only were offered here) in June of 1965, a year before the trial. It does not become new evidence by having it repeated to an investigator two years later.

There are noticeable infirmities in what Schnee is reported to have said. Nothing developed at the trial indicated that any conspiracy activity occurred at the Fairfield Motor Inn, which Schnee said was one target of Natalizio's card-pulling project. Second, except for an investigator's recent report of an oral admis-

---

[*] Attorney Simons' affidavit states that in a telephone call to Charles Schnee from his office under subterfuge on June 24, 1965, Schnee admitted he was hired to get cards by "Mario." Two weeks later, Schnee told Simons' office it was not Mario but "Johnny Petella." After the trial, both Schnee's allegedly stated that they had been active in a card-pulling episode at Natalizio's instigation.

sion to him by Natalizio (hearsay again), the proof offered does not indicate that the cards attempted to be removed from the records of the Bridgeport Motor Inn had any relationship to the narcotics transaction.[7] And, third, even if Natalizio had attempted to remove the cards for the fictious names under which Caron had registered, that might implicate Natalizio, it would not necessarily exonerate Miller. There is some merit to the government's argument that the person who received heroin at the Bridgeport Motor Inn would in all likelihood be the last person to risk discovery of his role by openly expressing an interest in registration cards for the same motel for the very dates in question.

Another allegation is that "the description given by Michael Caron to Government agents on October 16, 1963, of the man to whom he delivered his car in Bridgeport fits Mario Natalizio and does not fit the defendant James Miller." (Defendant's Motion for a New Trial, p. 2, ¶ 7). Neither Natalizio's physical appearance nor Miller's are newly discovered. Caron identified Miller when he saw him prior to trial and he and his wife made an in-court identification of him.

To sum up, Natalizio's confession and the so-called "corroborating items" relating to the central issue that Natalizio rather than Miller was the guilty party were known by the defendant and his attorneys long before trial. While it is newly presented to the court, it is not newly discovered.

---

[7] Natalizio denies that the person whose registration card was sought had any relation to the narcotics transaction.

*Excuses for failure to use the evidence.*

In a search for escape from the dilemma created by the obvious fact that the defense knew of the evidence of Natalizio's implication prior to the trial, the defendant offers several explanations, but all paths lead to dead ends:

1. The government should be estopped from asserting that the evidence is not newly discovered, because even after the government was permitted to read their transcript of the tape in 1966, it persisted in its claim that Miller was guilty, expressing doubts about the validity of the tape and whether Natalizio had exonerated Miller. This expressed attitude of confidence in Miller's guilt, it is claimed, led the defense to believe that if it offered the tape "the government would counter with some cogent evidence, however false in fact, that Natalizio was not guilty." This explanation is entirely without merit.

2. The government would have objected to the introduction of the tape on the ground of lack of proof of authenticity. If it is authentic, as the defense claims, there is no apparent reason why that could not have been established. In any event, the possibility of an objection by the prosecution is no excuse for failure to litigate the issue.

3. Miller would have had to take this stand to establish that the other voice on the tape was Natalizio's. This would have required him to waive his fifth amendment privilege. The fundamental right not to testify is not in issue here. The privilege is not both a shield and a sword. As stated in *Green* v. *United States*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958), "It will not do to say that the matter could not have been disclosed at the criminal trial without the personal testimony of Green who, as the

criminal defendant, was privileged not to testify. . . . Green cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U.S.C. § 2255." (256 F.2d at 484). *Cf. Reiss* v. *United States*, 324 F.2d 680 (1st Cir. 1963); *United States* v. *Soblen*, 203 F.Supp. 542, 565 (S.D. N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *United States* v. *DiGregorio*, 148 F.Supp. 526 (S.D. N.Y. 1957). Viewed from another side, this was a staged confrontation at Natalizio's residence, not a chance meeting. There were investigators employed by the defense to "wire" Miller for the Miller-Natalizio confrontation, to be in the vicinity at the time, and to receive and transcribe the tape. It is difficult to see why they could not have identified Natalizio as the other party on stage with Miller.

4. Had the tape been offered and excluded, the government would have been able to float adverse innuendo. This requires no comment.

5. Now I come to the fifth and last point of the defendant's explanation why the evidence against Natalizio was not offered. The defendant was advised by counsel that if he offered the tape, revealing that he had been "wired" when he talked to Natalizio, he would incur a substantial risk of being murdered. The defendant does not claim that this was inept advice; on the contrary, the claim is made that "it was good, sound, advice." Whatever facts that advice may have been based on have not been revealed to the court.[8]

---

[8] I find this logically difficult to reconcile with the claim that Natalizio confessed to relieve his conscience.

Perhaps the defense was faced with a serious problem of trial strategy.[9] Without claiming to know what it should have done with this evidence, one need have no hesitation in saying that, having made the decision not to offer it at the trial, the defendant cannot now assert that because such evidence still exists, he should have a new trial in order to present it.

*The Repudiated Confessions*

Since Rule 33 suggests that the court should be sensitive to any evidence which shows that the original trial resulted in a miscarriage of justice and weigh it carefully against the interest in finality and adherence to procedural requirements, 4 W. Barron, Federal Practice & Procedure § 2281 (Rules ed. 1951), it is advisable, to say the least, that the evidence of a confession by Natalizio on which the defendant relies be considered more fully.

There is little doubt that if Natalizio had testified at the trial to what is contained in his "confession" that might have materially assisted the defense. But further analysis is called for. In sworn testimony on September 6, 1967, at an interrogation by Mr. Newman, the United States Attorney, at which time Natalizio was represented by counsel, and on Septem-

---

[9] The defendant also takes the position that by his pre-trial presentation to the government of the fruits of the Miller-Natalizio confrontation the prosecution became obligated to shoulder the entire load of protecting Miller against an erroneous identification. The principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963), cannot be stretched to impose on the prosecution the duty to prepare or present the case for the defendant. See the illuminating opinion of Judge Frankel in *United States* v. *Gleason*, 265 F.Supp. 880 (S.D. N.Y. 1967). See also *United States* v. *Soblen*, 301 F.2d at 242.

ber 12, 1967, before a Grand Jury, he repudiated the truth of the unsworn written confessions plus the affidavit of Lane, the investigator who allegedly heard Natalizio confirm the confession. And he denied that he had ever told Miller that he was involved in the conspiracy for which Miller was convicted. About the written confession, he testified that three armed men stopped him in his car at 3:00 a.m. on July 14, 1967, in North Miami Beach. They took him to two adjoining rooms on the right side of the Sunaqua Motel in Hallendale. They handcuffed one arm and ordered him to write what they told him to or they would kill him. He wrote what they told him to. He denied under oath that what he wrote was true. The affidavit of Mr. Newman discloses that an investigation begun promptly after September 6, 1967, revealed that three men checked into the only two adjoining rooms on the right side of the Sunaqua Motel on July 13, 1967, and paid in advance for three nights. They left on the 14th without asking for a refund. This unusual conduct, coupled with the fact that the person who registered gave the names of his companions at that time as "Mr. Russell" and "Mr. Lewis" which suprised [sic] the sceptical motel clerk because she had the impression that all three were of Italian extraction, served to recall the incident for her. She noted that three men as described by Natalizio did take adjoining rooms on July 13th. Fearing that their hasty departure might have been because of damage to the rooms, another employee entered the rooms and noticed ashes and some burnt paper in the wash basin. A further search of the room disclosed a crumpled sheet of paper on which was written in crude handwriting with misspellings what appeared to be the first of several pages of a confession to a crime, mentioning some location up North, most likely

in New England. Natalizio had stated to Mr. Newman that he wrote four or five different versions of a confession dictated by the men who were referring to some notes they had before they were satisfied with the version that he had written. Perhaps this explains why *two* written confessions,[10] dated July 12th, were sent to Mr. Simons in the same envelope.

Further confirmation of Natalizio's sworn testimony of what happened on the morning of the 14th of July is found in the report of the manager of the apartment where Natalizio lived. He was awakened and asked by Natalizio to be let into his own apartment because he did not have his keys. This incident serves to corroborate Natalizio's testimony that the three men who had him sign a confession at gunpoint retained the keys to his car and apartment after they left him at the motel in the early hours of July 14th.[11]

Natalizio swore that he did not give any true information to Lane, the investigator. While his reasons for agreeing to see and talk with the investigators are a bit confusing, he states that he pretended to cooperate with them because he wanted to learn from them what they knew about other affairs of his related to criminal activities and to get prepared to repay them in kind for the treatment the men who forced him to write the confession had given him. Quite naturally, he associated the investigators with the three men who had forced him to sign the con-

---

[10] They are in crude handwriting and contain many misspelled simple words.

[11] An affidavit of Mr. Simons based upon a report of an investigation since the hearing by his investigators takes issue with some of the circumstances of the duress related by Natalizio. These are trivial differences as to details. However, they confirm the fact that the Sunaqua Motel episode did occur.

fession. They did not reveal to Natalizio that they were Simons' investigators.

Looking at the confession only in isolation and not to the manner in which it was obtained will not suffice. Viewing the events as a whole, grave doubt is cast upon the worth of the confession as support for this motion.

In a sense, what is proffered in support of the defendant's motion might be regarded as merely cumulative on the issue of identification. The defendant's evidence at the trial that the Bridgeport contact might have been some other "Frank" was only circumstantial at best. A confession by the true "Frank" would be something quite different. Bearing in mind that in applying the recognized standards to the evidence offered on this motion, the general stricture of Rule 33 that "the court . . . may grant a new trial . . . if required in the interest of justice," I turn to the serious consideration this evidence is entitled to without the limitation that it is merely cumulative. Would it be likely to produce an acquittal?

*Admissibility of the Confession*

The confessions are hearsay. The orthodox rule is that a statement by a third person against penal interest is not an exception to the hearsay rule, *Donnally* v. *United States*, 228 U.S. 243 (1913), but see the vigorous dissent of Holmes, J., at 277, and the discussion in 5 J. Wigmore, Evidence §§ 1476, 1477 (3d ed. 1940). Model Code of Evidence, rule 509 (1942). This circuit has recently indicated a willingness to re-examine the rule. See *United States* v. *Devico*, 380 F.2d 325 (2d Cir. 1967); *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). Assuming, arguendo, that the exception is recognized, the question remains

whether Natalizio's statements qualify as being truly against penal interest.

"Even a broadened penal interest exception must have some boundaries and must be limited at least to statements admitting a particular crime for which prosecution is possible at the time." *United States* v. *Devico*, 380 F.2d at 327. With Caron's eye-witness identification of Miller so thoroughly tested at the trial, Natalizio would run such a remote risk of prosecution, as to be negligible. This he knew, because Lane, the investigator, conceded in his affidavit that he told Natalizio, "he couldn't be convicted with it." And, when Natalizio asked Miller in Florida on August 6, 1965, "How are they going to indict me and indict you? How can that be done to both of us?" Miller answered, "Let me tell you something. If I beat this case you understand? And I've got everything going for me. I'm as clean and innocent as my son. Follow me? If I beat this case and if this is the same case they're pulling on you, where are they going to go with this case." Natalizio: "I don't know." Miller: "Let's be sensible about this thing." Natalizio: "I don't know." Miller: "Do you think that the man that identified me can turn around and say, oh no, it's not him anymore, it's him. I mean, are you for kidding. You got to walk away from it if it's the same case." [12] At that time, Miller apparently as-

[12] Natalizio denied making any confession at this meeting with Miller. As indicated before, n. 4, I have not passed on the accuracy of the transcript, nor attempted to analyze exactly what Natalizio's end of the conversation meant or what he may have intended it to mean. The government does not concede its accuracy or authenticity. It strikes me as at least curious that Natalizio would have to be forced at gunpoint to sign a confession after Miller had been convicted and lost his appeal, and yet have freely confessed his guilt before Miller went to trial.

sured Natalizio not only that he could never be convicted, but also that he couldn't be indicted for the same apparent offense. If an objective test is applied to determine what is against penal interest some further explication of the confused dialogue between Miller and Natalizio would be necessary to satisfy me insofar as the problem of admissibility is concerned that he made a declaration against penal interest which is referable to this particular case. If the test is subjective, the defendant's brief argues that Miller told Natalizio that he was not going to incriminate him, but merely needed facts about "time" to defend himself. In fact, Miller did not attempt to introduce any evidence at the trial to implicate Natalizio.

In any event, the exception for hearsay against penal interest, like any other hearsay exception, is applicable only in the event of the declarant's death or unavailability. *Cf. Syracuse Eng'r Co.* v. *Haight*, 97 F.2d 573 (2d Cir. 1938). 5 J. Wigmore, Evidence § 1456 (3d ed. 1940). Natalizio was alive and nothing was offered to show that he would not have been available. While on this motion it is not worth tracing the way Natalizio was discovered on the occasions the defense found him, it is apparent that they were able to get in touch with him quite readily.

*Credibility of the Confession*

On the assumption that Natalizio would be produced to testify at a new trial hearsay objections would vanish. And, by laying aside the fact that such testimony he might give is not newly discovered, consideration of that testimony on the merits would be called for.

The defendant argues that in the administration of criminal justice the search for truth is so encompassing that it would be degrading to such an inquiry to

impose any restrictions upon the grant of a new trial whenever a defendant comes forward with any evidence not offered at the original trial. There is, of couse, more to it than that. To adopt that view without question is to ignore the well establishel principles of law which require recognition of competing considerations.

The broad rule is the same in criminal and civil cases. Of course, there is a difference in presumptions and burden of proof. But in either case the motion is addressed to the discretion of the trial judge. The final test for the granting of a new trial on the basis of newly discovered evidence is whether or not the evidence will "probably produce an acquittal." *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964); *United States* v. *On Lee*, 201 F.2d 722, 724 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953); *United States* v. *Rutkin*, 208 F.2d 647 (3d Cir. 1953); *United States* v. *Johnson*, 142 F.2d 588 (7th Cir. 1944), *dismissed*, 323 U.S. 806 (1944); 4 W. Barron, Federal Practice and Procedure § 2282 (Rules ed. 1951); 8 J. Moore, Federal Practice, ¶ 33.03[1] (2d ed. 1966).

The trial judge sits as the thirteenth juror. *Applebaum* v. *United States*, 274 Fed. 43, 46 (7th Cir. 1921). See also 4 W. Barron, Federal Practice and Procedure § 2281 (Rules ed. 1951). He may "utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion." *Brown* v. *United States*, 333 F.2d at 724. The proferred new evidence is not accepted as true; its credibility must be weighed by the trial judge. Thus in *Jones* v. *United States*, 279 F.2d 433, 436 (4th Cir.), *cert. denied sub nom. Princeler* v. *United States*, 364 U.S. 893 (1960), "Where there is a grave question of the credibility of the after-discovered evidence . . . the role of the trial court is that of the fact-finder, so

much so that the Supreme Court has said an appeal from the resolution of the facts should be dismissed as frivolous. [Citing *United States* v. *Johnson*, 327 U.S. 106 (1946).] The Rule has been applied where, as here, a third party confession is the after-discovered evidence upon which the motion for a new trial is found. [citing *Jeffries* v. *United States*, 215 F.2d 225 (9th Cir. 1954); *Connelly* v. *United States*, 271 F.2d 333 (8th Cir. 1959).]"

Although all that has been discussed was only preliminary, yet it had to be stated in order that the complex starting point of this polemic be comprehensible and it allows me to anticipate my conclusions.

Only by taking the written confessions of Natalizio in isolation, divorced from any sworn statements he made can it be argued that the confession is credible. If he is believable at all, it would be more reasonable to believe his testimony under oath. *Cf. DeBinder* v. *United States*, 303 F.2d 203 (D.C. Cir. 1962). To say the least, his credibility is doubtful. Obviously he is a person whom a jury would not believe.

So without again running through the scenes when the two confessions were written by Natalizio in 1967, the whole performance is too lunatic not to awaken the utmost scepticism. Here the defense has submitted two versions of a confession written at the same sitting plus the testimony and affidavit of an investigator to whom Natalizio allegedly confirmed them. The defense did not produce the alleged confessor, although Mr. Newman's affidavit discloses that they had ample opportunity to subpoena him. They claim that motions such as this are usually decided solely on the basis of affidavits. That method is permissible. *United States* v. *Johnson*, 327 U.S. 106 (1946); 8 J. Moore, Federal Practice ¶ 33.03[3] (2d ed. 1966). See also *United States* v. *Troche*, 213 F.

2d 401, 403 (2d Cir. 1954); *United States* v. *On Lee*, 201 F.2d 722.

Natalizio has not sworn to his confession. The hypothesis that his confession was "spontaneous" is so unlikely as to be almost discarded "ab initio." Furthermore, he has repudiated it. He did so twice, once by sworn testimony before the United States Attorney, when he was accompanied by his counsel, and again before the Grand Jury, when he was not. The compulsion to speak the truth may indeed sometimes be induced by ethics, but it rests on a more solid foundation when spoken under the risk of prosecution for perjury. Weighed with those considerations in mind, I am wholly satisfied that the written confessions were obtained by duress. A threat of murder at the point of a gun no doubt is most extreme, but viewed in connection with traffic in narcotics on the scale conducted by this conspiracy, see *Rivard* v. *United States*, 375 F.2d 882 (5th Cir. 1967), it is not unlikely. It easily constituted such duress as to invalidate the confessions. Disbelief of the confessions of Natalizio can be deepened by exploring the testimony at the trial a little further. At the trial Caron not only identified Miller, he also quoted Rivard as saying that the man Frankie to whom delivery had been made in Bridgeport was his friend Frankie and a "hair dresser." The defense now argues that it is unlikely that Rivard would attempt to conceal the identity of Miller from Caron by calling Miller "Frankie" yet reveal it by referring to his occupation. "If Rivard made the statement, therefore it was a lie," they say. Viewing it from the aspect of one person further removed, it would be a most amazing piece of perjury for *Caron* to concoct by himself that James Miller was "Frankie" and a hair dresser. In point of fact, Miller had used the name Frank in con-

nection with earlier criminal activities. His finger prints were on a police record bearing his photograph and the name and signature of Frank—Coppola. And he is a hair dresser, who is the owner and operator of a beauty shop in Milford near Bridgeport, Connecticut. The reference by Rivard to Frankie, the hair dresser, knocks out the hypothesis that it was Natalizio. Natalizio was never known as, never used the name of, and never was called "Frank."

Miller had a fair trial. Despite the prolonged and thorough attack upon Caron's identification of Miller, the jurors were satisfied of his guilt.

The evidence in support of the motion for a new trial is not newly discovered. Even if it would not amount to a circumvention of the rules to disregard that, it is my conclusion that the evidence would not probably produce an acquittal.

The motion for a new trial is denied.

Dated at Hartford, Connecticut, this 20th day of November, 1967.

M. JOSEPH BLUMENFELD
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 286995 839